Corella Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 769, AFL–CIO. Case 28–CA–12448

April 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On February 22, 1995, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions to the judge's decision, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order[2] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Corella Electric, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer Frank Brown and Gregory Heath immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.''

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.''

3. Substitute the following for relettered paragraph 2(e).

''(e) Post at its facilities in Phoenix, Arizona, and at the Navajo Army Depot, copies of the attached notice marked 'Appendix.'[8] In addition, mail copies of the attached notice to all current and former employees employed on the Navajo Army Depot project in 1994. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees about their union activity or that of their fellow employees.

WE WILL NOT create the impression among our employees that the union activities of another employee have been placed under surveillance.

WE WILL NOT threaten our employees with discharge for supporting the Union.

WE WILL NOT create a new policy to interfere with and restrain employees in the exercise of their Section 7 right to discuss the Union.

WE WILL NOT threaten employees with loss of benefits in order to discourage support for the Union nor will we place the protected activities of our employees under close surveillance.

WE WILL NOT discharge employees because they engaged in protected concerted activity or activity on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Frank Brown and Gregory Heath immediate and full reinstatement to their former jobs or,

[1] The Respondent excepts only to the judge's failure to find that Frank Brown, a member of the International Brotherhood of Electrical Workers (IBEW), is not an employee within the meaning of Sec. 2(3) of the Act. Although there is no evidence that Brown was paid by the IBEW, the Respondent asserts that Brown is not a statutory employee because he obtained permission from the IBEW to work for the Respondent pursuant to its ''salting'' program requiring that Brown make efforts to organize the Respondent's employees. We note first that the Respondent did not raise this contention before the judge. In any event, it is settled Board law that full-time paid union organizers are employees under Sec. 2(3) of the Act. *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992); *Town & Country Electric*, 309 NLRB 1250, 1258 (1992). We note that the U.S. Supreme Court granted certiorari on this issue in *Town & Country Electric v. NLRB*, 147 LRRM 2133 (8th Cir. 1994), petition for cert. granted docket No. 94–947 (1994).

[2] The judge inadvertently omitted an expunction-of-records provision from his recommended Order and notice. We shall accordingly modify the recommended Order and notice to include such provision. We shall also modify par. 2(a) of the recommended Order to conform the judge's reinstatement language to that traditionally used by the Board, and par. 2(d) to correct an inadvertent error in the judge's notice posting provision.

if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, plus interest.

WE WILL notify each of them in writing that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

CORELLA ELECTRIC, INC.

Richard Auslander, Esq., for the General Counsel.
N. Douglas Grimwood, Esq. (Twitty, Sievwright & Mills), of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Phoenix, Arizona, on August 30 and 31, 1994,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 28 on April 29, and which is based on a charge filed by International Brotherhood of Electrical Workers, Local Union No. 769, AFL–CIO (the Union) on March 11. The complaint alleges that Corella Electric, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

The issues involved are:

I. Whether Respondent terminated its employees Frank Brown and Gregory Heath because they engaged in union activities or other concerted protected activities.

II. Whether Respondent acting through certain of its supervisors committed one or more of the following acts, the effect of which was to interfere with, restrain, and coerce its employees in the exercise of their rights guaranteed by Section 7 of the Act:

A. Coercively interrogated employees about their membership in, activities on behalf of, and sympathies for the Union.

B. Threatened to terminate unit employees and subcontract unit work if the employees selected the Union as their collective-bargaining representative.

C. Threatened unit employees with loss of benefits if the employees joined, supported, or assisted the Union.

D. Promulgated a rule prohibiting solicitation on behalf of the Union.

E. Threatened to terminate unit employees if they selected the Union as their collective-bargaining representative.

F. Created the impression among its employees that it was maintaining surveillance of its employees' union activities.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

[1] All dates herein refer to 1994 unless otherwise indicated.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is an Arizona corporation which operates an electrical contracting business in the building and construction industry with its principal office located in Phoenix, Arizona. Respondent further admits that during the 12-month period ending March 11, in the course and conduct of its business operations, it contracted for and performed services for the U.S. Department of Defense for the National Guard at the Navajo Army Depot facility located near Bellemont, Arizona, with a value in excess of $100,000. During the same 12-month period referred to above, and in the course and conduct of its business operations also referred to above, Respondent purchased and received in interstate commerce at the Navajo Army Depot goods and materials valued in excess of $5000 directly from points located outside the State of Arizona. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Brotherhood of Electrical Workers, Local Union No. 769, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. The project

According to Respondent witness, John Corella, Respondent's president and chief executive officer, Respondent obtained a contract with an agency of the U.S. Government to perform certain work at an installation called the Navajo Army Depot (depot), which is close to Bellemont, Arizona, near Flagstaff. Initially scheduled to be performed between October 1993 and March, the work was both extended by the Government and performed on a delayed basis even after the extensions. The contract between Respondent and the Government provided for $400/day in liquidated damages for delays which were neither caused by or excused by the Government. According to one estimate from the project foreman, Rolf Buehler, Respondent was obligated for over $12,000 in liquidated damages caused by unexcused delays (Tr. 180).

Essentially, the work in question consisted of providing electricity over 4 to 6 miles of overhead high tension lines for the purpose of bringing energy to various ammunition storage bunkers. A diagram of the area in question was received into evidence (R. Exh. 1). To perform this work, Respondent first surveyed the affected area and compared its survey to one provided by the Government. In this case, there was some discrepancies between the two surveys which contributed to the delay. Next, holes were drilled in the ground and wooden poles were installed. Here again delays were encountered because unexpected rock deposits slowed

the drilling and many of the poles were found by inspectors to be defective due to high moisture content. These defects were not discovered until after installation so the resulting replacement process also delayed the work.

After the replacement poles passed inspection, workers installed hardware, strung wires overhead, set up electrical transformers, and made final connections. Once again, these final steps were delayed because Respondent encountered delays with its suppliers providing the necessary equipment and because of harsh weather conditions.

Much in this case is allegedly explained or excused by the pressures from the Government to complete the project on a timely basis, notwithstanding the above-listed factors and by the internal company pressures to avoid the liquidated damages. To provide additional facts, I turn back to the record.

2. Supervisors

To perform this work or any work, supervisors and employees were needed. Respondent called two of the former as its witnesses. Rolf Buehler, a foreman on the project now working for Respondent as an electrician, and his son, and supervisor, Ralph Buehler, project manager. Between 1969–1989, Rolf Buehler owned an electrical contracting business in Long Island, New York, and employed 5 to 10 employees. On the instant project, Rolf Buehler supervised between 8 to 10 employees. In his testimony, Rolf Buehler added additional reasons for the delays in completing the project allegedly caused by employee slowdown: in part because employees were talking union on worktime, in part, because employees had a poor attitude, and in part because employees inherently tend to slow down toward the end of a job as a kind of work preservation strategy (Tr. 180–181).

Ralph Buehler has been with Respondent for about 5 years. Prior to that he has held several other jobs, such as purchasing agent and payroll clerk, for electrical contractors in and around the Phoenix area and, like his father, owned his own electrical contracting business for a short period.

According to Ralph Buehler, during the first quarter of 1994, Respondent had another Arizona project underway besides the depot project. This other project was located at Ft. Huachuca and, like the depot job, involved installation of outside high voltage along overhead wires. Ralph Buehler never personally visited the Ft. Huachuca project which had its own project manager, a man named Savage who did not testify in the instant case. Ralph Buehler also testified that certain of Respondent's employees in early 1994 were assigned to temporary jobs in the State of California. Under established procedures, when the California job is completed, Respondent's employees may return to Arizona where they had a preference for any job vacancies before a new employee is hired off the street.

3. Employees

Frank Brown, an alleged discriminatee, is and has been a member in good standing with the Union for approximately 11 years. Prior to October 1993, he heard through the grapevine that Respondent was hiring. Because Respondent was nonunion, Brown first obtained permission from the Union to work there. Pursuant to an IBEW program called ''salting,'' the Union granted permission to Brown on condition that he make efforts to organize Respondent's employees wherever he might be assigned. Brown submitted a resume of his past experience and was subsequently interviewed in Phoenix by Rolf Buehler. Both Brown, a witness for the General Counsel, and Rolf Buehler agree that in the interview, the subject of Brown's union membership came up, but they differ as to the specifics. Based on all or most of Brown's employment history, Rolf Buehler knew that at least at one time, Brown had belonged to the Union because all or most of the contractors for whom Brown had worked were union contractors. Rolf Buehler testified that Brown said he had always ''worked union'' in the past, as Buehler had already noted. According to Brown, Rolf Buehler responded, ''That's no problem.'' In any event, a few weeks later, about October 1993, Brown was hired by Rolf Buehler as a journeyman lineman for $28 per hour and assigned to the depot project.

According to Ralph Buehler, it was he who hired Brown. Ralph Buehler recalled that before he was hired, Brown asked how long the project would last. At this point, Ralph Buehler explained to Brown that he was being hired to work on phase two of the Army depot project, a phase which began in July 1993, and, without promising Brown he could work for any specific length of time, Ralph Buehler testified he told Brown that there was no other work after phase two was finished. Ralph Buehler also testified that his actual hire date would be delayed for a time due to defective poles and other problems.

According to Brown, when he was interviewed in Phoenix by Rolf Buehler, the latter said the job would last for 12–18 months. Then in rebuttal, Brown returned to the stand to testify that it was Rolf Buehler, who discussed with him, the delays caused by defective poles and problems with rock holes.

The second alleged discriminatee, Gregory Heath, a witness for the General Counsel, testified that he was hired as a laborer on or about November 7, 1993. As a laborer, Heath was paid $14.37 per hour. Later, Heath teamed up with Brown to work as the latter's groundsman, a job which paid $21.62 per hour.

All agree that on March 9 both Brown and Heath were called into the project office and terminated by Ralph Buehler, who said the job was coming to an end. The General Counsel contends that the alleged rationale was a pretext and both men were laid off because of their union activities. Before resolving this and related issues, one final segment of background will be helpful.

4. The organizing campaign

According to General Counsel witness, Edward Nicksic, formerly a business manager for the Union for 27 years, he received a telephone call from Brown in early February. Brown explained he was working for Respondent at the depot and that he and other employees were interested in joining the Union. Brown indicated certain points of dissatisfaction on the job such as a feeling that employees were not being paid correct wage rates, such as receiving no benefits, and such as not being treated with respect by supervisors. When Brown asked for assistance in his organizing activities, Nicksic instructed Brown to drive to Phoenix (about 135 miles away) and to pick up a package of union authorization cards, which Brown was to have signed by employees, and then mail the signed cards back to Nicksic who

on receipt would file a petition with the Board seeking an election.

Brown did what was requested of him. In fact, his efforts on behalf of the Union began even before his call to Nicksic as he explained to various coworkers the advantages of being organized as he perceived them.

An issue in this case concerns when Brown performed his organizing activities. Apparently at the request of most employees, Respondent did not have the usual 30-minute lunchbreak. Instead, employees were allowed two 15-minute breaks one in the morning and one in the afternoon, periods of time which some employees spent eating their lunch. The advantage of not taking a noon lunchbreak was employees' departure form the job 30 minutes sooner than they would otherwise be able to leave, thereby beating a portion of the rush hour.

I will return to the issue of when Brown was organizing for the Union, but for now I note that he obtained 11 union authorization cards which he mailed to Nicksic. As promised, the latter then filed a petition with the Board on February 15 (Case 28–RC–5206). The unit described by the Union in the petition is as follows:

> Journeymen linemen, linemen, electricians, operators, groundsmen employed by Corella Electric in the State of Arizona; excluded: guards, watchmen and supervisors as defined under the Act. [G.C. Exh. 3.]

A notice of representation hearing was duly issued setting a date for hearing on February 28 (G.C. Exh. 5). The Employer, by Ralph Buehler, requested that the hearing be postponed until March 2, and without objection, the request was granted (G.C. Exh. 6). Instead of a hearing on March 2 however, Nicksic withdrew the petition (G.C. Exh. 7). According to Nicksic, he withdrew the petition because in a prehearing conference with Corella, the owner, and Corella's attorney, the Employer produced a list of 49 employees doing outside work within the State of Arizona. Because Nicksic had only 11 signed cards obtained by Brown, Nicksic believed it prudent to withdraw the petition. Brown had been subpoenaed for the hearing by Nicksic because Brown had been the leader of those who wanted the Union. Before the hearing was canceled, Brown was addressed harshly by the Employer's attorney, who inquired of Brown, who had given him permission to be there. Brown responded that he had informed both his foreman and general foreman that he had been subpoenaed for the hearing.

B. *Analysis and Conclusions*

1. Alleged unlawful interrogation/threat to terminate employees

In support of this allegation, the General Counsel called Fred Joshongeva, a groundsman for Respondent during both phases of the depot project. During the second phase of the project, which Joshongeva measured between August 1993 and April, the witness became aware of Brown's campaign to organize employees. In fact, after work, on February 9, Joshongeva attended a union meeting at a Flagstaff hotel, and while there he signed a union authorization card (G.C. Exh. 2(a)). Many other employees did the same.

Almost a month after he signed the card, on or about Wednesday, March 2, about 1 p.m., Rolf Buehler asked Joshongeva to meet him at one of the bunkers in the field because one of the lines wasn't right. When Joshongeva arrived at the location, Rolf Buehler did not discuss the line, but instead asked Joshongeva what he thought regarding the situation with the Union. Before Joshongeva could respond, Buehler stated that John Corella, the owner, didn't like unions and that Corella was a pretty hot-tempered man when he got upset, perhaps due to his Mexican blood. Buehler concluded by saying that if Corella really got upset, that he would probably call in a subcontractor to finish the job and send the other employees home.

Rolf Buehler admitted having a conversation with Joshongeva, but set the date a week or two after March 8 and 9. Buehler said he asked a general question how the situation was progressing. Then Buehler allegedly added, ''in a general conversation, that because of the situation that had developed, the Company not meeting the target date, that the Company had no choice, because already being on liquidated damages, to finish the project with or without the present employees.''

I have little difficulty in cutting through Rolf Buehler's vague acknowledgment of talking to Joshongeva to credit the latter's version of the time and content of the conversation. There would have been much less need after Brown and Heath had been terminated to send the kind of message Rolf Buehler was sending with the conversation.

At page 13 of its brief, Respondent characterizes the discussion in issue as ''merely one between a foreman and a long term employee about matters of common interest in the working place.'' I reject this characterization and find instead that because Rolf Buehler was a statutory supervisor at the time in question (Respondent's answer, par. 4, G.C. Exh. 1(e)), the conversation violated Section 8(a)(1) of the Act. First, unlike Brown, there is no evidence that Joshongeva was an open and active union supporter and organizer. Moreover, the inquiry occurring in a secluded location away from other employees was calculated to uncover the extent of union organizing and the basis for it. Finally, the accompanying threats of possible job loss as a penalty for supporting the Union leave little room for disagreement over the coercive nature of the conversation. *Rossmore House*, 269 NLRB 1176 (1984); *Foamex*, 315 NLRB 858 (1994), and cases cited there.

2. Alleged miscellaneous coercive statements

All agree that on March 8, about 7:30 a.m., Rolf Buehler held a 15- to 20-minute meeting with about 13 unit employees and made certain statements, the exact details of which are disputed. According to the General Counsel's witnesses, Joshongeva, Brown, and Heath, Rolf Buehler said words to the effect, everyone knows that Frank's trying to bring in the Union (then Buehler pointed toward Brown); I don't have any problems with that, but the Company won't stand for it. Anyone caught talking or discussing union matters on the job is going to be terminated, and anyone caught taking unauthorized breaks for eating lunch would be warned and after three warnings, the employee would be terminated. Buehler concluded by telling employees that this job will get done with or without you.

According to Rolf Buehler, after making the statements essentially as reported above, he told employees that if they found it difficult to live with the new restrictions, and could not participate in union business either prior to or after work, then he was willing to restore the 30-minute lunch hour. Buehler reported that no one at the meeting wanted this (Tr. 154). No other witness corroborated Buehler as to this element of his remarks and I don't believe him. However, in the final analysis, whether he made these last statements makes little difference to the finding of the violation.

Prior to this meeting, there had been no restrictions on what employees were permitted to discuss during this worktime. Furthermore, according to Brown, supervisors had been lenient in allowing employees to take a short break around noontime to get something to eat and then continue working.

In finding certain violations of Section 8(a)(1) of the Act which arise out of Rolf Buehler's remarks, I note the following. Buehler's statements to employees that Brown had been organizing for the Union created the impression among employees that Brown's union activities had been placed under surveillance. How else would Buehler, the supervisor, know about Brown's activities. As such, Buehler's remarks violated Section 8(a)(1) of the Act. *South Shore Hospital*, 229 NLRB 363 (1977).

I also find that Buehler's remarks violated Section 8(a)(1) of the Act because they threatened discharge for supporting the Union, when Buehler stated this job will get done with you or without you. See *Pittsburg & New England Trucking*, 249 NLRB 833 (1980).

I further find that since there were no prior restrictions on what employees could discuss during worktime, Buehler's attempt to restrict discussions of the Union during worktime constituted a new policy established for the purpose of interfering with and restraining employees in the exercise of their Section 7 rights. *Automotive Plastic Technologies*, 313 NLRB 462 (1993); *Franklin Iron & Metal Corp*., 315 NLRB 819 (1994). Moreover, Buehler's remarks ''disparately focused on discussions about the Union by its principal employees advocate.'' See also *Rock-Tenn Co*., 315 NLRB 670 (1994); *Sage Dining Service*, 312 NLRB 845 (1993); *Stoody Co*., 312 NLRB 1175, 1181 (1993).

Finally, Buehler also threatened loss of benefits which was the practice of taking a short break for lunch when employees were expected, at their own request, to work through lunch. To put this violation in other terms, ''strict enforcement of an existing rule, or promulgation of a new one during a union organizing campaign, has been regarded as evidence of illegal conduct, unless a showing is made that an objectively observable decline in productivity was caused by solicitation or by the campaign. I Morris, *Developing Labor Law* 96 (2d ed. 1983). As I will find below in greater detail, no such showing has been made here, notwithstanding Respondent's liability for liquidated damages caused by reasons other than Brown's solicitation of card signers.

3. Alleged impression of surveillance on March 9

Both Brown and Heath reported that on March 8 and particularly on March 9, they were kept under surveillance by Rolf and Ralph Buehler. This surveillance consisted of repeated drives past Brown's work area and observations by both Buehlers from a hill overlooking Brown's worksite. On one occasion, in the afternoon of March 9, the Buehlers stopped their vehicle at Brown's worksite and got out. A confrontation ensured between Rolf Buehler and Brown with the former complaining that Brown and Heath were not working in the right area and Brown complaining he was working where he had been told to work and he didn't know who to take orders from. Finally, Ralph Buehler intervened and told his father to return to the vehicle so Ralph could take care of the matter.

The Buehlers testified that they were maintaining close surveillance because they believed that Brown and Heath were not making appropriate progress in their work and were thereby engaging in a slowdown. However, Brown and Heath denied any slowdown and I find no credible evidence to support the Buehlers' statements that Brown and Heath engaged in a slowdown.

Paragraph 8(h) of the complaint alleges that Respondent was creating the impression of surveillance by engaging in the above-described activities. The General Counsel renews the argument in his brief, pages 10–11. The testimony of Brown and Heath establishes not the creating of an impression of surveillance, but actual surveillance of their work area. I find that the Buehlers' activities on March 8 and 9 which were concluded as noted below with the terminations of both Brown and Heath are coercive and designed to ensure either that Brown's union activities were observed or that he was deterred from engaging in any such activities. I find the surveillance was unlawful and violated Section 8(a)(1) of the Act. *Clark's Stores*, 168 NLRB 273, 273–274 (1967), enf. granted in part 407 F.2d 199 (6th Cir. 1969).

4. Alleged termination of Brown and Heath in violation of the Act

As noted above, at the close of business on March 9, both Brown and Heath were called into the project office and told that their services were no longer needed, because the job was coming to a close. Two checks had been prepared for each. Brown challenged the assertion that the job was coming to an end by noting that a new employee named Al Gil had been hired as a laborer just a few days before, and noting that Heath had been hired originally as a laborer. To this Rolf Buehler responded that the job was too menial for Heath and that he wouldn't want the job.

In analyzing the terminations of Brown and Heath, I begin with a brief statement of Board law applicable to the instant case: the General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.'' *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank*

Black Mechanical Services, 271 NLRB 1302 fn. 2 (1984). ''[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). See also *Custom Window Extrusions*, 314 NLRB 850, 863–868 (1994).

With the above statement in mind, I have little difficulty in finding that the General Counsel has established a prima facie case that Brown's protected activities were a motivating factor in his discharge. Motive is a question of fact and the Board may infer discriminatory motivation from either direct or circumstantial evidence. *NLRB v. Nueva Engineering*, 761 F.2d 961, 967 (4th Cir. 1984). To support this conclusion, I note the following circumstantial evidence.

Brown was an employee actively engaged in organizing for the Union and his activities were known to Respondent's supervisors, Rolf Buehler, who referred to these activities at the March 8 meeting, and Ralph Buehler. I also note that the timing and abruptness of Brown's termination coincided with Brown's protected activities. See *Liberty National Products*, 314 NLRB 630, 639 (1994).

I also note that contrary and contradictory reasons given for Brown's termination. As noted above, Rolf Buehler testified Brown and Heath were engaged in a slowdown. However, I note that discipline of a union activist tends to give rise to an inference of violative discrimination. *Norris/-O'Bannon*, 307 NLRB 1236, 1242 (1992).

Then when Brown was laid off, he was told it was due to a shortage of work. At the hearing still other reasons were given. Ralph Buehler testified that Brown's rental truck was costing more each month than every other truck. And because Brown was the last lineman to be hired, based on Respondent's seniority system, he was the first to be laid off (Tr. 224). Shifting reasons for an employee's termination is evidence of pretext. When pretextual reasons for a discharge are given, this is evidence that the employer wishes to hid the real reasons, which in this case was because Brown engaged in concerted protected activity. See *Sherwin-Williams Co*., 313 NLRB 163 (1993); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

As to Heath, Ralph Buehler testified that he was selected for layoff because he was part of Brown's crew and, according to Ralph Buehler, ''it is not good practice, for production reasons, morale, whatever, to break up crews and start switching people around, at that point in the project'' (Tr. 225). Of course, the seniority rule, so important to justify Brown's layoff was of no importance for Heath's layoff, because a laborer hired just a few days before was continued at work while Heath was terminated.

In light of the above, I find that Heath was terminated because Brown was terminated. Because Brown was terminated in violation of Section 8(a)(1) and (3) as I find, so was Heath.

5. The bargaining order

The General Counsel seeks a bargaining order in this case. In deciding whether that extraordinary relief is appropriate here, I begin with some basic law regarding the subject. As stated in *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 83 (2d Cir. 1994):

> The Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), approved the remedial use of bargaining orders in two types of cases involving employer misconduct. The first category of cases involve[s] ''outrageous'' and ''pervasive'' ULPs. *Id*. at 613 (citation omitted). The second category involve[s] ''less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.'' *Id*. at 614. As noted by both the ALJ and the Board, this case falls into Category II. In such cases, the general counsel must prove that: (1) the union was at some point supported by a majority of the bargaining unit employees; and (2) the employer's unfair labor practices undermined the union's majority strength and ''the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight.'' See *id*. at 614–15.

Although the General Counsel has not stated which category he contends this case falls under, I find that it is a category II case. I further note that at paragraph 5 of the complaint (G.C. Exh. 1(c)) the General Counsel recites the same unit description as did the Union in the withdrawn petition, that is, the General Counsel seeks a bargaining order for a statewide unit. See *Fish Plant Services*, 311 NLRB 1294, 1297 (1993), where the Board affirmed the hearing officer's finding in a construction case, that the Union's petitioned-for multisite unit of all employees was appropriate. See also *P.J. Dick Contracting*, 290 NLRB 150 (1988).

Respondent does not dispute the General Counsel's claim that a statewide unit is appropriate. However, Respondent does dispute the General Counsel's claim that he has obtained a majority of signed authorization cards from unit employees, as required by Board law. See *Gourmet Foods*, 270 NLRB 578 (1984).

Both the General Counsel and Respondent agree that Brown obtained signed authorization cards from 11 unit employees at the depot project: Joshongeva, Manymule, Miller, Beaty, Best, Reichard, Taylor, Bruce Zah, Brown, Burrone, and Heath (G.C. Exhs. 2(a) through (d) and (f) through (m)). But Respondent also had a second project at Fort Huachuca[2] at the time of the R case petition and Respondent contends that its unit employees performing work there should also be counted in determining the majority status of the Union during the critical period.

Based on the testimony of Ralph Buehler which I credit, the following additional Respondent employees were work-

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[2] In some cases, I have changed the name of the project at ''Sierra Vista at Ft. Huachua'' to ''Ft. Huachua.''

[3] No evidence was presented to show that this person was a statutory supervisor and should be excluded from the unit for that reason. In fact, according to the General Counsel's rebuttal witness, Joe Bell, business manager for Local 769, ''general foreman'' is a classification covered in its bargaining agreement with union contractors (Tr. 299–300).

[4] To avoid unnecessary issues, I have not listed nor counted those Respondent employees temporarily assigned to projects in California: Thomas Biakaiddy, Kenneth Fink, and Michael Roberts. Furthermore, I have not listed nor counted the name of Charles Culhane for whom Respondent appears to have provided additional information outside the record (Br. 18).

ing on the date the Union filed its petition but did not sign authorization cards:

(1) Paul Balzano—Electrician (depot)

(2) Rich Barrigan—Electrician (depot)

(3) Eugene Brandwein—Electrician working on a prison just outside Phoenix and currently working in Nevada.

(4) George Brown—Equipment Operator (Ft. Huachuca)

(5) Terry Caldwell—Electrician (Ft. Huachuca)

(6) Clifford Cormany—Electrician (Ft. Huachuca)

(7) Abel Cruz—Electrician (Ft. Huachuca) and prison project referred to above (moved back and forth)

(8) James De Muth—Electrician (Ft. Huachuca)

(9) McKinley Deskins—Electrical working foreman[3] (Ft. Huachuca)

(10) Anthony Ennis—Electrician/Operator (Ft. Huachuca)

(11) Charlie Figueroa—Electrician, worked some time temporarily in California, but most of time at Ft. Huachuca.

(12) Robert Gilman—Electrician (depot)

(13) William Hedrick—Electrician (Ft. Huachuca)

(14) Gary Kunstman—Lineman (Ft. Huachuca)

(15) Stephens McKinney—Lineman/Groundman (Ft. Huachuca)

(16) Steven Nichols—Electrician/Laborer (depot)

(17) Bennett Reeves—Operator/Electrician (Ft. Huachuca)

(18) Jesus Verdugo—Laborer/Electrician/Operator (Ft. Huachuca)

(19) Elias Villanueva—Electrician/Laborer/Operator (Ft. Huachuca)

(20) Skyler Zah—Electrician/Laborer (depot)[4]

When the 20 names listed above are added to the 11 names for whom Brown obtained signed cards, it is clear that the General Counsel has failed to obtain a majority of cards signed by bargaining unit employees (R. Exh. 2, Jt. Exhs. 1–34). The General Counsel contends, however, that certain of the employees listed above would fall under the jurisdiction of IBEW Local 640 whose jurisdiction covers inside electricians. I note that when Bell, the business manager for the Charging Party, was called in rebuttal, no testimony was given that specific employees were under the jurisdiction of Local 640, and I am unwilling to speculate now on which employee might fall under the jurisdiction of which IBEW local. I find that Bell's testimony does not help the General Counsel here. In sum, I find that the General Counsel has failed to prove a majority and no bargaining order may issue for that reason.

I also find that a bargaining order is not warranted in this case because the General Counsel has not shown that the unfair labor practices found were so severe as to preclude a fair election. In support of this finding, I note as follows:

(1) First, the Union withdrew its petition for election for reasons having nothing to do with the Employer's unfair labor practices. This act of the Union should be a factor in determining whether the General Counsel is entitled to a bargaining order. Cf. *NTA Graphics*, 303 NLRB 801, 804 (1991). (In case of egregious and pervasive unfair labor practices, the union lost the election, but failed to file objections; Board held no basis for a bargaining order as union has implicitly agreed to be bound by the results.)

(2) The General Counsel has failed to show why a fair election is not possible. In this respect, I note that there is no showing that the unlawful terminations of Brown and Heath or their surveillance by the Buehlers were disseminated to other bargaining unit employees, particularly those working at the Ft. Huachuca project. See *Munro Enterprises*, 210 NLRB 403 (1974). While Rolf Buehler's remarks on March 8 clearly singled out Brown, the unfair labor practices which flowed from that event were not sufficiently serious to justify the bargaining order. *Hennessy Service Corp*., 204 NLRB 266, 273 (1973); *Schulte's IGA Foodliner*, 241 NLRB 855, 856 (1979). Compare *Airtex*, 308 NLRB 1135 (1992).[5]

CONCLUSIONS OF LAW

1. The Respondent, Corella Electric, Inc., is an employer engaged in commerce and its operations affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers, Local Union No. 769, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act in the following particulars:

(a) When it unlawfully interrogated Fred Joshongeva about the union activity of Respondent's employees.

(b) When it created the impression among employees that Brown's union activities had been placed under surveillance.

(c) When Respondent threatened its employees with discharge for supporting the Union.

(d) When Respondent created a new policy to interfere with and restrain employees in the exercise of their Section 7 right to discuss the Union.

(e) When Respondent threatened employees with loss of benefits in order to discourage support for the Union and when Respondent placed the activities of Brown under close surveillance also to discourage support for the Union.

4. Respondent violated Section 8(a)(1) and (3) of the Act when it terminated Brown and Heath because Brown engaged in protected concerted activities.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and from any like or related conduct and to take certain affirmation action designed to effectuate the policies of the Act.

I shall also recommend that Respondent offer Frank Brown and Gregory Heath full and immediate reinstatement to the positions they would have held, but for their unlawful terminations. If these jobs no longer exist, they are to be reinstated to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

I shall also recommend that the Company be ordered to make whole Brown and Heath for any loss of earnings or benefits they may have suffered by reason of the discrimination against them. I shall further recommend that the Company be ordered to expunge from its records any reference

[5] In recommending against issuance of a bargaining order, I have avoided citations to the opinions of the various courts of appeals decisions refusing to enforce the Board's bargaining orders on grounds not recognized by the Board, such as employee turnover, the passage of time since the employer's unfair labor practices, and other such factors. See, e.g., *NLRB v. Cell Agricultural Co*., 41 F.3d 389 (8th Cir. 1994); *DTR Industries*, 39 F.3d 106 (6th Cir. 1994).

to the employees' unlawful layoff or discharge, and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982). Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6] It will also be recommended that the Company be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

As the Company may have completed its Navajo Army Depot project, I shall recommend that, in addition to posting an appropriate notice at its present office and principal place of business, the Company be directed to mail copies of such notices to all current and former employees employed on the project in 1994.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Corella Electric, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activity or that of their fellow employees.

(b) Creating the impression among employees that another employee's union activities had been placed under surveillance.

(c) Threatening its employees with discharge for supporting the Union.

(d) Creating a new policy to interfere with and restrain employees in the exercise of their Section 7 right to discuss the Union.

(e) Threatening employees with loss of benefits in order to discourage support for the Union and placing activities of union organizers under close surveillance also to discourage support for the Union.

(f) Discharging employees because they engaged in protected concerted activity or activity on behalf of a union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Frank Brown and Gregory Heath full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(b) Make Frank Brown and Gregory Heath whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharges. Backpay to be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Phoenix, Arizona, and at the Navajo Army Depot, copies of the attached notice marked ''Appendix.''[8] In addition, mail copies of the attached notice to all current and former employees employed on the Navajo Army Depot project in 1994. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''